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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10
11 ON DEMAND DIRECT RESPONSE, LLC,
et al.,

12 Plaintiff(s),

13 v.

14 SHANA LEE MCCART-POLLAK,

15 Defendant(s).

Case No.: 2:15-cv-01576-MMD-NJK

Order

16 Pending before the Court is an order for Third-Party Defendant Kevin Harrington and his
17 attorneys (Michael Feder and Gabriel Blumberg) to show cause why they should not be sanctioned
18 for failing to comply with the Court's previous discovery order. Docket No. 345. Mr. Harrington
19 (through his attorneys) initially responded to document requests with a boilerplate recitation that
20 he found no responsive documents after his records were searched and his files were reviewed.
21 *See* Docket No. 310. The Court held that such a response violated Rule 34(a)(1) of the Federal
22 Rules of Civil Procedure, which requires the responding party to come forward with an explanation
23 of the search conducted with sufficient specificity to allow the Court to determine whether a
24 reasonable inquiry was made. Docket No. 310 at 3-4. The Court ordered supplemental responses.
25 *Id.* at 4. Mr. Harrington's supplemental responses marginally altered his original responses by
26 indicating that he "searched and reviewed physical files in his home office as well as electronic files"
27 to no avail, but that he reserved the right to supplement to provide responsive documents in the future.
28 *See* Docket No. 345 at 2. Given the obvious deficiency with the supplemental responses, the Court

1 ordered that further supplements be provided, and ordered Mr. Harrington and his attorneys to show
2 cause why they should not be sanctioned in a fine for violating the Court's previous order. *Id.* at 3-5.

3 The response to that order to show cause indicates in general terms that Mr. Harrington has
4 been participating in discovery in good faith and that his counsel believed the supplemental responses
5 were sufficient. *See* Docket No. 353. The response misses the mark.¹ For example, it indicates that
6 "[Mr.] Harrington and his counsel should not be sanctioned for lacking responsive documents and
7 performing a search for responsive documents despite knowing none would be located." Docket No.
8 353 at 3 n.3. Such an assertion is ridiculous as that is obviously not the issue before the Court.² The
9 Court has made clear on multiple occasions that a party is not entitled to simply assert that he looked
10 for responsive documents and did not find any; he must make a reasonable inquiry to find responsive
11 documents and must provide a detailed explanation of that inquiry so the Court can judge whether it
12 was sufficient due diligence. Docket No. 310 at 3-4; Docket No. 345 at 2; *see also* Docket No. 289 at
13 3-4. This is not a novel proposition, but rather reflects well-settled law. *See, e.g., Rogers v. Giurbino,*
14 *288 F.R.D. 469, 485 (S.D. Cal. 2012); A. Farber & Partners, Inc. v. Garber, 234 F.R.D. 186, 189*
15 *(C.D. Cal. 2006).* Mr. Harrington (through his counsel) failed to provide a detailed description even
16 after being ordered by the Court to do so, and the response to the order to show cause lacks a plausible
17 explanation as to how Mr. Harrington and his counsel could have reasonably believed they were
18 complying with the Court's order. Instead, Mr. Harrington and his counsel waited until fines were on
19 the table for violating the Court's order to file a belated declaration providing a more detailed recitation
20 of the search undertaken. *See* Docket No. 353-2 at ¶¶ 8-9.³

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22 ¹ The order to show cause was premised on two rules, Rule 37(b)(2)(A) and Rule 26(g).
23 The response to the order to show cause addresses only the latter rule. *See* Docket No. 353 at 3.

24 ² What is more, counsel clearly knows that is not the issue before the Court because he has
25 attached to the response to the order to show cause a declaration providing a more detailed
26 recitation of the search undertaken. *See* Docket No. 353-2 at ¶¶ 8-9. Counsel's assertion that the
Court is considering imposing sanctions because a party lacks responsive documents is, at best,
disingenuous.

27 ³ Concurrently with the filing of the response to the order to show cause, Mr. Harrington
28 was required to provide further supplemental discovery responses to Ms. McCart-Pollak. Docket
No. 345 at 3-4. The Court expresses no opinion herein as to whether the latest search description
provided in response to the order to show cause is sufficient.

Given the circumstances, the Court would be within its discretion to impose a fine. *See, e.g.*, Fed. R. Civ. P. 37(b)(2)(A) (courts may issue “just orders” for disobedience with a discovery order). The Court takes Mr. Harrington and his counsel at their word that they are attempting to comply with the Court’s orders, and the Court expects them to strictly comply with their discovery obligations moving forward. As such, the Court **CAUTIONS** Mr. Harrington and his counsel that they must comply with all applicable rules and all orders moving forward. **FAILURE TO DO SO MAY RESULT IN THE IMPOSITION OF SANCTIONS, UP TO AND INCLUDING CASE-DISPOSITIVE SANCTIONS.** As this is the second such warning, *see* Docket No. 310 at 5, Mr. Harrington and his counsel should expect the imposition of sanctions for future violations.

In all other respects, the order to show cause is **DISCHARGED**.

IT IS SO ORDERED.

Dated: May 15, 2018

Nancy J. Koppe
United States Magistrate Judge